Office - Supreme Court, U.S.
FILED
NOV
ALEXANDER L. STEVAS,
CLERK

No. 82-261

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOHN W. FRIEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Pereira v. *United States*, 347 U.S. 1 3

Stevens v. *United States*, 306 F. 2d 834 4

United States v. *Baker*, 50 F. 2d 122 ..... 4, 5

United States v. *Dondich*, 506 F. 2d 1009 4

United States v. *Fassoulis*, 445 F. 2d 13, cert. denied, 404 U.S. 858 ..... 4, 5

United States v. *Joyce*, 499 F. 2d 9, cert. denied, 419 U.S. 1031 4

United States v. *Leathers*, 135 F. 2d 507 5

United States v. *Toliver*, 541 F. 2d 958 5

Statute:

18 U.S.C. 1341 1

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-261

JOHN W. FRIEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the evidence was insufficient to sustain his mail fraud conviction.

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on one count of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to three years' imprisonment. The court of appeals affirmed without opinion (Pet. App. A1-A2).

1. The evidence showed that petitioner was the half-owner of a restaurant (Tr. 2.98) that was destroyed by a fire. In the opinion of the fire marshal, the fire was arson that originated in the dumbwaiter (Tr. 8.13, 8.15). The restaurant was experiencing financial difficulties prior to the fire (Tr. 2.109, 3.20-3.21, 3.148-3.149, 4.25-4.26, 5.68, 6.120, 6.123, 6.190, 7.75), and petitioner had stated that he needed money for another venture (Tr. 5.11-5.12, 5.34, 5.71). Petitioner had also expressed a desire and intention to burn the restaurant

(Tr. 3.25-3.26, 3.32-3.33, 6.99), had pointed out places where a fire might be set (Tr. 3.27), and had stated that the dumbwaiter was the best place (Tr. 3.29). On the day of the fire, a flammable rug cleaning fluid was brought into the restaurant (Tr. 3.16-3.17, 5.88-5.90, 5.92), and some of the furnishings were removed (Tr. 5.19, 5.95). Petitioner was the last person to leave the restaurant prior to the fire (Tr. 7.139), and appeared to be undisturbed while watching the fire (Tr. 5.99, 7.42).

The proof of loss statement, which was prepared at petitioner's direction for submission to his insurer (Tr. 6.135, 12.98, 12.128, 12.150), misrepresented and overstated the restaurant's contents (Tr. 3.100, 3.103-3.104, 4.129, 5.102, 6.139; Gov't Exh. 7), and petitioner personally told the chef to overstate the amount of food in the restaurant (Tr. 6.139-6.140). Petitioner signed and swore to the proof of loss, including the representation that he had not caused the loss and that no attempt was made in the attached schedules to deceive the insurance company (Tr. 7.130; Gov't Exh. 7). The statement was sent to the insurance company's home office in Hartford, Connecticut, along with a cover letter from petitioner's attorney that bore the notation "Certified Mail, Return Receipt Requested" and indicated that a copy was sent to the local adjuster in Philadelphia (Tr. 7.63; Pet. App. A7). The director of property claims for the insurance company testified that the proof of loss was received through the mail (Tr. 7.58); his assertion was based on the fact that the correspondence was received in Hartford with the certified mail notation and the fact that such materials are usually received by mail (Tr. 7.62-7.63).

2. Petitioner contends that there was insufficient evidence that he caused the mailing of the proof of loss statement to the insurance company or that the proof of loss was in fact transmitted via mail. Both facets of his contention

raise factual issues that were properly resolved against him below and do not warrant further review by this Court.

a. Petitioner acknowledges that the proof of loss statement was essential to the insurance claim and hence to the fraud (Pet. 8),[1] but he argues that—because all negotiations were conducted with a local Philadelphia adjuster—conveyance of the proof of loss statement by mail to Hartford was an unauthorized and "uncontemplated aberration" on the part of his attorney. The argument is without substance. Petitioner was well aware that the local adjuster was merely an agent for the insurance company. The final settlement, including the proof of loss upon which it would be based, had to be forwarded for approval to the company—which petitioner knew was located in Hartford[2]—before the claim could be paid. Particularly in view of the distance involved, the mail was the most likely means of transmittal. Since petitioner knew or reasonably should have known that execution of the fraudulent scheme required that the proof of loss be sent to the company via the mail, it is immaterial that he may not have "contemplated" that his attorney would mail it. See *Pereira* v. *United States*, 347 U.S. 1, 8-9 (1954) (one causes the mails to be used where he "does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended * * *").

b. Whether the mail was used to transmit the proof of loss statement was an issue of fact that could "be established, like most other facts, by circumstantial evidence."

---

[1]Accordingly, petitioner's reliance on cases (Pet. 7-8) dealing with mailings the contents of which were immaterial to or did not further the fraudulent schemes is misplaced.

[2]The insurance policy indicated that the company's home office was in Hartford (Gov't Exh. 6), and the proof of loss statement that petitioner signed reflected the same address (Gov't Exh. 7).

Stevens v. *United States*, 306 F.2d 834, 836 (5th Cir. 1962); *United States* v. *Fassoulis*, 445 F.2d 13, 17 (2d Cir.), cert. denied, 404 U.S. 858 (1971). As the district court properly held in denying petitioner's motions for a new trial and judgment of acquittal (Pet. App. A4), the distance of the transmission, the testimony concerning general practice and the certified mail notation on the cover letter provided sufficient evidence to enable the jury to conclude that the mails had been used.[3]

Petitioner's claim (Pet. 9-11) of a conflict among the circuits is groundless. *United States* v. *Dondich*, 506 F.2d 1009, 1010 (9th Cir. 1974), accepted the principle that mailing can be proved by circumstantial evidence, including evidence of general practice; the conviction was reversed only because the government failed to offer *any* evidence of business custom or practice from which an inference of mailing could be drawn. In *United States* v. *Joyce*, 499 F.2d 9, 18-19 (7th Cir.), cert. denied, 419 U.S. 1031 (1974), the conviction on one count, based on an intracity letter, was reversed because the recipient testified that the letter would have been marked with the same receipt stamp whether it was hand-delivered or delivered by mail; conviction on another count, however, was affirmed where the letter on which the count was based was sent interstate (as here) and the sender testified that "in all probability" he mailed it. And while *United States* v. *Baker*, 50 F.2d 122, 123-124 (2d Cir. 1931) held that distance of transmittal, stamping of the

---

[3]The district court entered a verdict of acquittal on a second count based on a letter sent within Philadelphia because there was no evidence establishing that it had been mailed rather than hand-delivered (Tr. 9.29, 9.33). There is little likelihood, however, that a letter from Philadelphia to Hartford would have been hand-delivered, nor does petitioner suggest there is any evidence of hand-delivery.

letter with the recipient's incoming mail stamp and testimony concerning general practice were insufficient to establish mailing, it is a 50 year-old decision by a divided court that has been consistently rejected as precedent within its own circuit. See e.g., *United States* v. *Leathers*, 135 F. 2d 507, 511 (2d Cir. 1943); *United States* v. *Fassoulis, supra*, 445 F.2d at 17; *United States* v. *Toliver*, 541 F.2d 958, 966 (2d Cir. 1976).[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

NOVEMBER 1982

---

[4]The Second Circuit, in *Leathers*, *Fassoulis* and *Toliver*, distinguished *Baker* on the ground that in *Baker* there was testimony that the letters might have been delivered by hand and there was no direct proof of mailing. Moreover, even in *Baker* the court acknowledged that proof of mailing may be established by circumstantial evidence. 50 F. 2d at 123.